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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD THEODORE SMITH,

Defendant and Appellant.

B288952

(Los Angeles County  
Super. Ct. No. PA085964)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

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Gerald Theodore Smith was convicted by a jury of assault with a deadly weapon and sentenced as a second strike offender to an aggregate state prison term of 11 years. On appeal this court affirmed the conviction but reversed the trial court's finding that a prior out-of-state conviction constituted a serious felony under California law. We remanded to permit a retrial of the prior serious felony conviction allegation and for resentencing. (*People v. Smith* (Dec. 11, 2017, B279363) [nonpub. opn.].)

On remand the court held a bench trial at which the People presented new evidence concerning the prior felony conviction. The court again found the prior out-of-state felony was a serious or violent felony under California law and sentenced Smith as a second strike offender. Smith contends the court abused its discretion by denying his request to dismiss the prior strike conviction. We reject Smith's argument but remand the matter to allow the court to consider whether to exercise its discretion under the recent amendments to Penal Code sections 667, subdivision (a)(1), and 1385<sup>1</sup> to dismiss the prior serious felony enhancement imposed. We also direct the trial court to give Smith the opportunity to request a hearing to present evidence demonstrating his inability to pay the applicable fines, fees and assessments.

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<sup>1</sup> Statutory references are to this code unless otherwise stated.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *The Initial Sentence*

After a jury convicted Smith of assault with a deadly weapon (§ 245, subd. (a)(1)),<sup>2</sup> the court held a bifurcated bench trial on the allegation Smith had been convicted of a prior serious or violent felony (kidnapping) in Oklahoma in 1977. The court found the Oklahoma kidnapping conviction to be true and ruled it qualified as a prior serious or violent felony conviction under the three strikes law and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The court denied Smith's request to dismiss the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and sentenced Smith as a second strike offender to an aggregate state prison term of 11 years: double the middle term of three years for aggravated assault, plus five years for the prior serious felony enhancement. The trial court imposed a \$30 court facilities assessment (Gov. Code, § 70373); a \$40 court operations assessment (§ 1465.8); and a \$300 restitution fine (the statutory minimum) (§ 1202.4, subd. (b)). The court imposed and suspended a corresponding \$300 parole revocation fine (§ 1202.45).

### 2. *The First Appeal and Remand*

On appeal Smith did not challenge his conviction for aggravated assault, but argued the trial court had erred in

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<sup>2</sup> The second amended information had charged Smith with two counts of forcible rape (§ 261, subd. (a)(2)). It was amended by interlineation during trial to add a count of assault with a deadly weapon. The jury found Smith not guilty on the rape counts.

finding his Oklahoma conviction for kidnapping constituted a serious or violent felony under California law.<sup>3</sup> We agreed with Smith's argument there was not substantial evidence in the record from which the court could have concluded the victim of the Oklahoma kidnapping was moved a substantial distance, as required for the conduct to constitute kidnapping under California law. We vacated Smith's sentence in its entirety and remanded to permit the People, if they were able to do so, to present additional evidence at a new trial establishing the Oklahoma kidnapping was a serious or violent felony within the meaning of the three strikes law and a serious felony pursuant to section 667, subdivision (a)(1).

On March 20, 2018, after receiving the remittitur, the trial court conducted a retrial on the prior conviction allegation at which the People presented evidence not offered at the first trial. The trial court again found the prior conviction allegation to be true and found it constituted a serious or violent felony under California law. Smith moved to strike the prior conviction for sentencing purposes based on its remoteness, his age and ill health and his lack of conviction for any violent offense in the intervening 40 years. The court denied the motion, finding there had been no change in circumstances since its prior refusal to strike the conviction. The court stated Smith's record showed some violence since the Oklahoma conviction, as well as convictions for weapons-related offenses. In light of those

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<sup>3</sup> Smith also argued on appeal the trial court had erred in refusing to dismiss the prior conviction for sentencing purposes and asked this court to correct an error in the abstract of judgment. In light of our reversal and remand we deemed those issues moot and did not address them.

findings, the court said, “I just don’t think *Romero* is appropriate.” The court imposed the same sentence it had previously.

## DISCUSSION

### 1. *Denial of Smith’s Request To Dismiss His Prior Strike Conviction Was Within the Trial Court’s Discretion*

Section 1385, subdivision (a), vests the court with discretion to dismiss a qualifying strike conviction “in furtherance of justice.” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530; *People v. Williams* (1998) 17 Cal.4th 148, 158.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams*, at p. 161.)

We review the trial court’s decision not to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*In re Large* (2007) 41 Cal.4th 538, 550.) “‘[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.’” (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) “[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to

explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] . . . [¶] . . . ‘[I]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. [Citation.] . . . Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Id.* at p. 378.)

Smith contends the trial court abused its discretion in refusing to dismiss his prior strike conviction because it considered only his criminal history and failed to give appropriate weight to the fact his prior strike conviction for kidnapping was more than 40 years old and his subsequent criminal offenses were not violent or serious felonies.<sup>4</sup>

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<sup>4</sup> Smith also argues the court erred in finding the circumstances of the Oklahoma kidnapping were similar to the current offense, bringing his criminal behavior “somewhat full circle.” We agree with Smith that the factual similarities of the Oklahoma conviction and the current conviction for assault are tenuous at best. In the Oklahoma case Smith and his uncle, fleeing the police after committing a purse snatching, forcibly entered a stranger’s apartment. Smith was carrying a sawed-off shotgun. Smith and his uncle then took two victims to a nearby house where they kept them for approximately 12 hours. In the instant case Smith was convicted of assaulting an acquaintance in his apartment. The victim testified Smith was acting strangely and became upset after she got hair dye in the bathtub.

The trial court properly articulated rational grounds for concluding, in the words of *People v. Williams, supra*, 17 Cal.4th at page 161, that Smith could not be deemed to be outside the three strikes scheme's spirit. Although Smith was not convicted of any serious or violent felony between the kidnapping conviction and the current offense, as the court found, "Smith has not had a significant break in his criminality since the seventies." Smith received a prison sentence of three years for the 1976 kidnapping. In 1980 Smith was convicted of carrying a concealed weapon and sentenced to prison for a term of one year three months to five years. In 1987 and 1988 Smith was convicted of transporting or selling a controlled substance, assault with a deadly weapon not a firearm and possessing a dirk or dagger. Smith was sentenced to 180 days in jail and three years of probation. In 1989 Smith was convicted of felony theft and sentenced to five years confinement. In 2006 Smith was convicted of second degree burglary and misdemeanor theft. He was sentenced to two years 30 days confinement. In addition, Smith was arrested more than 30 times between 1974 and 2006,

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Smith testified the altercation began when the victim attempted to use methamphetamine and he told her to leave. Regardless of how the disagreement started, both Smith and the victim testified Smith threatened the victim with a BB gun.

The trial court found these incidents were similar because they each occurred in an apartment with a woman where "violence occurred." While we agree with Smith these factors are too generic to conclude Smith engaged in repeated episodes of similar violent conduct, that error is not material in light of the court's reliance on Smith's overall criminal history and background, which supported its denial of the motion to dismiss the prior strike conviction.

including at least three arrests relating to probation violations and/or being a fugitive out of state. While the ultimate dispositions for many of those arrests are unknown, and many of them involved nonviolent crimes, Smith's repeated contact with law enforcement at the very least indicates a failure to fully conform his behavior to the law in a way that would overcome the presumption he is subject to the three strikes law.

These facts about Smith's background and character, in addition to the lack of any evidence regarding positive prospects in his life, amply justified the trial court's decision not to dismiss the prior strike conviction. (See *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 ["we cannot conclude that appellant led a crime-free life during the period between his 1981 strike priors and his current crimes, a factor which would give significance to the remoteness in time of those strikes"].)

2. *The November 29, 2016 Minute Order and Abstract of Judgment Must Be Corrected*

Smith requests this court correct errors that appear in the November 29, 2016 minute order and the abstract of judgment. The People agree correction is necessary.

During the March 20, 2018 sentencing the trial court incorporated the sentence imposed on November 29, 2016. The corresponding March 20, 2018 minute order states, "Sentence remains as previously imposed on 11/29/16." The reporter's transcript from the November 29, 2016 hearing reflects no imposition of a legal assistance fee pursuant to section 987.8. The November 29, 2016 minute order incorrectly assessed a legal assistance fee of \$457. The abstract of judgment repeated this mistake.



We order the correction of this error, so that the minute order and abstract of judgment accurately reflect the absence of any legal assistance fee imposed by the court. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of court’s oral pronouncement controls over clerk’s minute order]; *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [appellate court may correct clerical errors on its own motion or upon application of the parties].)

3. *A Limited Remand Is Appropriate*

a. *Remand Is Appropriate for the Trial Court To Consider Whether To Dismiss or Strike the Five-year Sentencing Enhancement*

At the time Smith was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss the section 667, subdivision (a), serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1 & 2.) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a), enhancement imposed on Smith. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, fn. 3 [remanding for resentencing when “the record does not indicate that the court would not have dismissed or stricken defendant’s prior serious felony conviction for sentencing purposes, had the court had the

discretion to do so at the time it originally sentenced defendant”].)

b. *Remand Is Appropriate for Smith To Request a Hearing on His Inability To Pay the Fines, Fees and Assessments Imposed by the Trial Court*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant’s ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under section 1202.4, subdivision (b), in contrast, is intended to be, and is recognized as, additional punishment for a crime. Section 1202.4, subdivision (c), provides a defendant’s inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)

In supplemental briefing filed with the permission of this court, Smith contends under *Dueñas* the assessments and fees imposed by the trial court should be reversed and the execution of the restitution fine stayed. The People argue Smith forfeited this issue on appeal because he failed to raise it in the trial court. However, as we recently explained when rejecting the same

argument in *People v. Castellano* (Mar. 26, 2019, B286317) \_\_ Cal.App.5th \_\_ [2019 Cal.App. Lexis 258] (*Castellano*), at the time the defendant was sentenced, “*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court’s consideration of a defendant’s ability to pay. . . . When, as here, the defendant’s challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano*, at p. \*5]; see also *O’Connor v. Ohio* (1966) 385 U.S. 92, 93 [87 S.Ct. 252, 17 L.Ed.2d 189]; *People v. Doherty* (1967) 67 Cal.2d 9, 13-14; see generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 [“[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”]; but see *People v. Frandsen* (Apr. 4, 2019, B280329) \_\_ Cal.App.5th \_\_ [2019 Cal.App. Lexis 309].) We similarly decline to apply the forfeiture doctrine to Smith’s constitutional challenge.

Relying on *Dueñas*, Smith asserts the court facilities and operations assessments should be reversed, and execution of the restitution fine stayed, unless and until the People prove he has the present ability to pay the fine. As we explained in *Castellano*, “*Dueñas* does not support that conclusion in the absence of evidence in the record of a defendant’s inability to pay. . . . [¶] . . . [A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to

be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano, supra*, 2019 Cal.App. Lexis 258 at pp. \*6-7]; accord, *Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169.) If the trial court determines, after considering the relevant factors, a defendant is unable to pay, then the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant’s ability to pay has been restored. (*Dueñas*, at pp. 1168-1169, 1172; *Castellano*, at p. \*7.)

As Smith’s conviction and sentence are not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fines, fees and assessments imposed by the trial court.

### **DISPOSITION**

The matter is remanded for the limited purposes of allowing the trial court to consider whether to dismiss or strike the prior serious felony enhancement imposed under section 667, subdivision (a), and to give Smith the opportunity to request a hearing on his ability to pay the fines, fees and assessments imposed by the trial court. If he demonstrates the inability to pay, the trial court must strike the court facilities assessments (Gov. Code, § 70373) and the court operations assessments (§ 1465.8); and it must stay the execution of the restitution fine. In addition, the trial court is directed to modify the minute order of November 29, 2016 to reflect there was no legal assistance fee

imposed by the court. Following the court's decisions on remand, a corrected abstract of judgment must be prepared and forwarded to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.